STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2014
v	Nos. 316804 and 317189 Oakland Circuit Court
CRAIG JERIL LEWIS, Defendant-Appellant.	LC Nos. 2012-243289-FC 2012-243290-FH

Before: STEPHENS, P.J., and TALBOT and BECKERING, JJ.

PER CURIAM.

In these consolidated appeals, defendant, Craig Jeril Lewis, appeals as of right his convictions following a jury trial of two counts of second-degree murder, MCL 750.317 (LC No. 2012-243289-FC),[1] larceny of a firearm, MCL 750.357b, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense (felony-firearm), MCL 750.227b (LC No. 2012-243290-FH). The circuit court sentenced defendant as a third-habitual offender, MCL 769.11, to serve to 40 to 80 years' incarceration for the second-degree murder convictions, 2 to 10 years' incarceration for the larceny of a firearm conviction, 2 to 10 years' incarceration for the felon in possession of a firearm conviction, and 5 years' incarceration for the felony-firearm, second offense conviction. We affirm.

I. FACTUAL BACKGROUND

Defendant's convictions arise from a series of events that began with a fight outside of a bar and culminated in the shooting death of two bar patrons. Trial testimony established that Kyle McGowan and Tyrell Tademy were leaving the bar when they were jumped by several individuals, including defendant and Lerrik Myers. Everyone involved in the fight was thrown out of the bar by security. McGowan was robbed of his personal belongings during the fight. McGowen and Tademy went to Tademy's vehicle and McGowan took Tademy's .380 caliber black and silver handgun from the vehicle and headed back toward the bar. Myers then grabbed

[1] The jury acquitted defendant of two counts of first-degree felony murder, MCL 750.316, one count of armed robbery, MCL 750.529, one additional count of felon in possession of a firearm, and four additional counts of felony-firearm 2d.

McGowan and the two started fighting. During the fight, McGowan lost control of the gun and it slid under a car. A witness testified that defendant took the gun, got into his car, and drove away from the bar with Myers and a third individual who was wearing a red vest.

Defendant returned to the bar later that evening, as did Myers and the individual in the red vest. At some point, a party bus from Detroit arrived at the bar and guests from the bus entered the bar. Sometime between 1:35 a.m. and 2:00 a.m., the party bus guests returned to the bus to leave. A witness saw defendant, Myers, and the man in the red vest approach the bus. Robert King, one of the party promoters, testified that he returned to the bus to pay the driver and a man, later identified as Myers, grabbed his arm, pointed a black gun at him, and demanded his possessions. King handed over a large sum of cash as well as his glasses. Witness testimony established that someone wearing either black or gray was standing beside Myers, and that the second person had a two-tone, silver and black handgun. A witness identified defendant as the second person. Someone yelled "he got a gun," people started screaming, and multiple gunshots were fired. Two passengers of the bus were killed. None of the witnesses saw who fired into the bus, although King heard gunshots coming from his left, which was where the gunmen, Myers and defendant, were standing. After the shootings, defendant left the bar with Myers and the man in the red vest.

Deputy Robert Charlton of the Oakland County Police Department testified at trial as an expert in firearm examination. He analyzed four shell casings recovered at the scene of the shootings and two bullets that were recovered from the victims' bodies. He opined that the recovered bullets were fired from different guns because the rifling characteristics on each bullet had different measurements. He added that his examination of the bullets showed that both were consistent with having been fired from a .380 caliber handgun. Further, he testified that two of the spent shell casings appeared to have been fired from one weapon and that the other two were fired from a different weapon.

Detective Steven Wittebort testified concerning three interviews he conducted with defendant after defendant's arrest. Defendant waived his *Miranda*[2] rights before the interviews. During the first interview, defendant asserted that he did not know who Myers was and that he knew nothing about the incident other than what he had heard on the news. When asked if he believed defendant's statements, Wittebort testified that he did not, and that he "instantly challenged [defendant]" and told him "he was a liar." Wittebort explained that he knew defendant was lying because his statements were contrary to those of other witnesses as well as photographs from the night of the shootings that showed defendant with Myers. Wittebort testified that defendant was "playing stupid" and "fishing" for information instead of answering questions and giving his side of the story. As a result, Wittebort terminated the interview.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Shortly thereafter, defendant requested to speak with Wittebort a second time. This time, defendant admitted that he had been at the bar, but gave few details about the shootings or any other events that happened at the bar that evening. Again, Wittebort told defendant, based on the information he had already received, that defendant "was a liar." Because defendant attempted to "fish[] for information" again during the second interview, Wittebort terminated the interview after about ten minutes.

Subsequently, defendant requested to speak with Wittebort a third time. This time, defendant admitted that he was at the bar, that he knew Myers, and that there was a fight at the bar that resulted in defendant picking up a handgun. Defendant told Wittebort that he gave the gun to Myers after Myers demanded it. Defendant stated that he drove away with Myers and the man in the red vest, only to return later in the evening. Defendant admitted that he, Myers, and the man in the red vest were standing in the parking lot and followed the passengers as they left the bar and headed to the bus. He said that he stood behind Myers while Myers robbed a man outside the bus, and that Myers was the person who fired shots into the bus. Defendant denied being the second shooter. Defendant also offered to provide the police with Myers' location, as officers had been unable to locate Myers after the shootings.

Defendant testified on his own behalf at trial and admitted that he witnessed the altercation between Myers, McGowan, and Tademy. He also admitted that he picked up Tademy's gun. However, defendant said that Myers took the gun from him after he retrieved it in the parking lot. He admitted that he left the bar with Myers and the man in the red vest, but then returned. Defendant also testified that he was present during the robbery and shootings and that he had, in fact, witnessed the robbery and heard gunshots. According to defendant, he was by his car when he heard an altercation. When he went to investigate, he saw Myers rob King at gunpoint. He then saw a flash from the barrel of the gun, so he turned and ran. Defendant said that he heard multiple gunshots while he was heading back to his car. He said that Myers and the man in the red vest ended up in his car and that he left with them because he was afraid that if he did not do what Myers said, he would be shot too.

Concerning his interviews with Wittebort, defendant admitted on cross-examination that he lied when he initially told police officers that he knew nothing about the shootings. He agreed with the prosecutor's assessment that this was a "whopper of a lie[.]" When asked how many times he lied to the police during the course of his interviews, defendant testified, "I can't recall." He later clarified that it was "[m]aybe two, three, two times" that he lied.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support the homicide convictions. We review de novo challenges to the sufficiency of the evidence. *People v Osby*, 291 Mich App 412, 415; 804 NW2d 903 (2011).

"Due process requires that, to sustain a conviction, the evidence must show guilt beyond a reasonable doubt." *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). The evidence is viewed in the light most favorable to the prosecution. *Id*. "Circumstantial evidence and the reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

"All conflicts in the evidence must be resolved in favor of the prosecution." *Id*. On review, we are mindful to "not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012).

The elements of second-degree murder are:

> (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. Malice includes the intent to kill, the intent to cause great bodily harm, or the intent to take an action whose natural tendency is to cause death or great bodily harm, wantonly and willfully disregarding that risk. [*People v Portellos*, 298 Mich App 431, 443; 827 NW2d 725 (2012) (internal citations and quotation marks omitted).]

On appeal, defendant only argues that there was insufficient evidence to prove his identity as one of the shooters. Identity is an element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

Viewed in a light most favorable to the prosecution, the evidence produced at trial established defendant's identity as one of the shooters. Witnesses testified that defendant and Myers were involved in an altercation with Tademy and McGowan, which resulted in defendant picking up and taking Tademy's two-tone, .380 caliber handgun. Later, defendant and Myers were outside the bar when the party guests started to return to the bus. An eyewitness[3] to the armed robbery of King identified both Myers and defendant as being armed. This witness described defendant's handgun as being similar to Tademy's .380 caliber gun. Shortly after this witness saw defendant with a handgun, the shooting began. The close proximity in time between the shooting and defendant being observed with a gun next to Myers supports the reasonable inference that defendant was one of the shooters that evening. Further, shell casings and bullets recovered from the victims support the inference that defendant was one of the shooters that evening. Charlton testified that the shell casings recovered from the scene were fired from two different guns, and that the bullets recovered from the victims were fired from two different handguns. Both of the bullets were likely fired from .380 caliber handguns, which was the same caliber handgun that defendant allegedly took from Tademy. From this evidence, a rational trier of fact could find that the prosecution proved the elements of second-degree murder beyond a reasonable doubt. See *Harverson*, 291 Mich App at 175.[4]

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[3] Although defendant attacks this witness's credibility on appeal, we will not interfere with the jury's role of determining the credibility of witnesses. *Eisen*, 296 Mich App at 331.

[4] Although the evidence produced at trial showed that each victim was shot by a different gun, we find that the evidence was sufficient for a rational trier of fact to find that defendant shot one of the victims and that he aided and abetted Myers in shooting the other victim. Defendant does not expressly raise an issue in this regard, but we find that a rational jury could have convicted defendant on an aiding and abetting theory on the second count of second-degree murder because defendant walked to the bus with Myers, drew a weapon at the same time as Myers, and fired

III. EVIDENTIARY ERROR

Defendant argues that Wittebort's testimony improperly commented on his credibility because Wittebort testified that defendant lied during his interrogations. Because defendant did not object to the testimony at trial, our review of the unpreserved evidentiary issue is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. Reversal is not warranted unless the plain error resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *Id*. at 763-764.

Generally, it is "improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). And testifying police officers have a special obligation not to venture into forbidden areas, such as commenting on another witness's credibility. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983).

As noted, defendant initially denied knowing anything about the shootings, and Wittebort testified that he told defendant that he knew defendant was lying during the interviews. Wittebort testified that he told defendant "numerous times" during the course of the interviews that he knew defendant was lying.

Assuming without deciding that Wittebort's testimony was improper, we conclude that defendant is not entitled to relief because he cannot show that the testimony prejudiced him. Defendant admitted during his own testimony that he had lied multiple times during his interviews with Wittebort. After initially testifying that he only told "[l]ittle simple lies," defendant agreed with the prosecutor's assessment that he told a "whopper of a lie" with regard to whether he was present at the bar on the night of the shootings. Furthermore, defendant's trial testimony expressly contradicted some of his statements in his interviews. For instance, defendant claimed during one of his interviews that he did not know Myers. At trial, defendant testified that he did know Myers. And, there was photographic evidence introduced at trial showing defendant and Myers together at the bar on the night of the shootings. Accordingly, we conclude that, to the extent Wittebort's testimony was improper, defendant cannot satisfy his burden of establishing prejudice. There is no plain error requiring reversal. *Carines*, 460 Mich at 763.

Defendant also asserts that his trial counsel was ineffective for failing to object to the testimony. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been

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shots at or around the same time as Myers, thereby assisting Myers and intending the commission of the offense. See *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001) (explaining the elements of an aiding and abetting theory).

different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Given defendant's own admission that he lied during his police interviews, we find that, even assuming counsel's performance was objectively unreasonable, defendant is not entitled to relief because he cannot establish that had counsel objected, the result of the proceedings would have been different. See *id.*

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Michael J. Talbot
/s/ Jane M. Beckering